No. 12235

United States
Court of Appeals
For the Ninth Circuit

ELMER SCHNEIDMILLER,

Appellant,

vs.

ADOLPH W. ENGSTROM, Trustee in Bankruptcy for Northwest Chemurgy Cooperative, a Corporation, Bankrupt,

Appellee.

OPENING BRIEF OF APPELLANT

JOSEPH L. HUGHES,
BENJAMIN H. KIZER,
Old National Bank Building,
Spokane, Washington.

GRAVES, KIZER & GRAVES
Of Counsel

Appeal from the United States District Court for the Eastern District of Washington, Northern Division

THE FRANKLIN PRESS, SPOKANE

No. 12235

United States
Court of Appeals
For the Ninth Circuit

ELMER SCHNEIDMILLER,

Appellant,

vs.

ADOLPH W. ENGSTROM, Trustee in Bankruptcy for Northwest Chemurgy Cooperative, a Corporation, Bankrupt,

Appellee.

OPENING BRIEF OF APPELLANT

JOSEPH L. HUGHES,
BENJAMIN H. KIZER,
Old National Bank Building,
Spokane, Washington.

GRAVES, KIZER & GRAVES
Of Counsel

Appeal from the United States District Court for the Eastern District of Washington, Northern Division

TABLE OF CONTENTS

		Page
I	Statement Showing Jurisdiction	1
II	Statement of Case	1
III	Specification of Errors	3
IV	Argument	4
	First: Chemurgy's petition for an Arrangement was not an application for an appointment of a receiver	5
	Second: Appointment of trustee in bankruptcy not made "pursuant to" Chemurgy's petition for an Arrangement	10
	Third: Appellee's suit not brought in time	12
	(a) State Supreme Court holds § 5831-5 not to be a statute of limitation	13
	(b) Federal decisions strictly to same point	14
	(c) Text and decisions applying rule to other statutes of like character	16
	(d) Trial Judge's Opinion — Sproul v. Gambone	23
V	Conclusion	25
Appendix		27
	Remington's Revised Statutes, §§ 5831-4-5-6	

TABLE OF CASES

Page

American R. Co. v. Coronas,
230 Fed., 545, 546 22

Bell v. Wabash R. Co.,
58 F. (2d) 569, 571 ..... 21, 24

Charlesworth v. Hipsh, Inc.,
84 F. (2d) 834, 847 ..... 15, 24

Charlesworth v. Hipsh, Inc., 299 U. S. 594 15

Eberhart v. U. S., 204 Fed. 884, 890, 891 21

Erie R. Co. v. Tompkins,
304 U. S. 64 ..... 18, 22

Ford, Davis & Bacon, Inc. v. Volentine,
64 F. (2d) 800, 802 19

Garrett v. Moore-McCormack Co.,
317 U. S. 239, 245 22

Guaranty Trust Co. v. York,
326 U. S. 99, 101 ..... 18, 19

Harrisburg, The, 119 U. S. 213, 214 ..... 20, 24

In re Appalachian Publishers,
29 F. Supp. 1021 ..... 14, 23, 24

In re Avorn Dress Co., 11 F. Supp. 574 8

In re Burke, 76 F. Supp. 5, 10 9

In re Wil-Low Cafeterias, 111 F. (2d) 83, 84 8

Morris v. Orcas Lime Co.,
185 Wash. 126, 53 P. (2d) 604 13

Page

Peeples v. Hayes, 4 W. (2d)
253, 256, 104 P. (2d) 305.....14

Sproul v. Gambone,
34 F. Supp. 441, 444.....23, 24, 25

Swift v. Tyson, 16 Pet. 1.....18

Urban Properties Corp. v. Benson,
116 F. (2d) 321..... 7

Vaughn v. U. S., 43 F. Supp. 306, 308.....21

Western Fuel Co. v. Garcia,
257 U. S. 233, 243.....20, 23

Wilson v. Ry. Co., 58 F. Supp., 844, 848.....21, 24

TEXTS AND STATUTES

Page

53 C. J. S., p. 904, Sec. 1 (2) (c) 17, 19

Federal Employers' Liability Act, § 6 ..... 21, 22

Remington on Bankruptcy,
5th Ed., Vol. 7, p. 208 § 3072 5

Remington's Revised Statutes,
§§ 5831-4-5-6 ..... 3, 7, 8, 10, 11, 12, 13, 16, 26

Remington's Revised Statutes, § 5831-1 ..... 13, 14

U. S. Bankruptcy Act (Chandler Act)
Chapter XI 3

U. S. Bankruptcy Act (Chandler Act)
§ 376 (2) 10, 11

11 USCA, § 1 (18) 7, 8

11 USCA, § 29e (Pocket part) 4, 16, 17, 23, 25

11 USCA, §§ 47, 48 1

11 USCA, §§ 701 et seq. 5, 6, 26

11 USCA, § 706 5

11 USCA, § 713 6

11 USCA, §§ 721-2 6

11 USCA, § 732 ..... 6, 9

11 USCA, § 742 6

11 USCA, § 776 (2) 10, 11

28 USCA, § 225 (c) 1

U. S. Judicial Code, § 128 amended 1

Washington Session Laws 1931, p. 160, § 1 13

74th Congress, Records of Second Session,
H. R. 8046, footnote 23

I.

Statement Showing Jurisdiction

This is an action brought by a trustee in bankruptcy to recover an alleged preference claimed to be owing to the bankrupt estate. It is, therefore, a controversy "relating to bankruptcy" under Sections 47-48 of 11 USCA. See also 28 USCA, Section 225(c) (U. S. Judicial Code, Sec. 128 amended).

II.

Statement of Case

This is one of quite a number of suits brought by appellee to recover alleged preferences whose final determination depends on this appeal. (See Stipulation, Tr. 29-34.) This appeal raises three issues of law, appellant contending that appellee's complaint fails to state a cause of action. The basic facts, as pleaded in the complaint which was filed on May 28, 1948, are as follows:

On May 29, 1947, Northwest Chemurgy Cooperative, a corporation herein referred to as "Chemurgy," filed its Petition for an Arrangement under Chapter XI of the Bankruptcy Act (11 USCA, §§ 701 et seq.). But after more than six months, then finding itself unable to consummate its proposed Arrangement, it was adjudicated bankrupt on December 13, 1947. Appellee was appointed trustee on January 6,

1948. For at least four months immediately prior to May 29, 1947, Chemurgy was unable to pay its debts in the ordinary course of business which made it insolvent within the meaning of the laws of the State of Washington.

During the four months prior to May 29, 1947, Chemurgy paid to appellant $4,766.03 upon an antecedent debt. The prayer is for judgment against the appellant in that amount.

As expressly avowed in the complaint, the action is based upon a Washington statute (Sections 5831-4-6 Remington's Revised Statutes) (Tr. 3), for the convenience of the court set forth as an appendix at the end of this brief, which provides that *if* a receiver (defined to include trustee) bring suit within six months from the date of the application for his appointment, he may recover all preferential payments made by the insolvent corporation within four months before the date of application for the appointment of such receiver.

Appellant challenged the sufficiency of the complaint to show compliance with the statutory limitations by his motion to dismiss (Tr. 6). That being overruled by the trial court, he then raised the same questions by his answer (Tr. 21), and judgment in favor of appellee followed.

III.

Specification of Errors

1. The Court erred in holding that appellee's complaint stated a cause of action.

2. The Court erred in holding that the filing of a Petition for an Arrangement under Chapter XI of the Act of Congress Relating to Bankruptcy (11 USCA §§ 701-724) constituted an application for the appointment of a receiver within the meaning of Remington's Revised Statutes of the State of Washington, § 5831-4.

3. The Court erred in holding that the payment referred to in paragraph 8 in the findings of fact herein (Tr. 24) was made within the four months' period designated by Remington's Revised Statutes, § 5831-6.

4. The Court erred in holding that this action was commenced within the six months' period designated in Remington's Revised Statutes, § 5831-5.

IV.

Argument

Prefatory. It will be seen that this lawsuit revolves largely around a determination of the date of the "application for the appointment of a receiver, pursuant to which application such appointment is made," (§ 5831-4, R. R. S., see Appendix). By the

terms of the statute the receiver must sue within six months of the date of that application, and he can recover only those preferences made within four months of that same date of application. Under the facts as stated in his complaint to sustain his recovery, appellee must contend:

First: That the mere petition of a debtor for an Arrangement under the Chandler Act is necessarily an application for the appointment of a receiver, even though the debtor is insolvent only in the Washington sense that it is unable to meet its obligations in due course, and even when such petition for an Arrangement does not ask for such appointment;

Second: That, where no receiver or trustee is petitioned for or appointed until the debtor has finally acknowledged its inability to consummate its Arrangement and has confessed its willingness to be adjudged bankrupt, the appointment of a trustee in bankruptcy is nevertheless made "pursuant to" such original petition for an Arrangement; and

Third: That the limitation to sue of the Bankruptcy Act (11 USCA 1947 Pocket Part, 29e)[1] strikes down the requirement of the Washington statute (§ 5831-5, Remington's Revised Statutes—see Appendix) that such suit must be brought within six months, although that requirement is made by this statute a condition precedent to his right to sue.

The first three assignments of error express our dissent from the first and second contentions above set forth.

---

[1]This is §11e of the Bankruptcy Act. We shall refer to it consistently as "§ 29e" herein.

First: CHEMURGY'S PETITION FOR AN ARRANGEMENT WAS NOT AN APPLICATION FOR AN APPOINTMENT OF A RECEIVER. This calls for a concise analysis of the "Arrangement" provisions of the Bankruptcy Act found in 11 USCA, §§ 701 et seq. contained in the Chandler Act enacted by Congress in 1938.

By its § 706 an Arrangement is defined as meaning

> "any plan of a debtor for the settlement, satisfaction, or extension of the time of payment of his unsecured debts."

Mr. Remington (Remington on Bankruptcy, Fifth Edition, Volume 7, page 208, § 3072) gives a lucid summary of the nature of arrangement proceedings in the following:

> "It must continually be borne in mind that arrangement proceedings under the Bankruptcy Act are primarily designed, not for the general administration of an insolvent's estate, as are the proceedings in bankruptcy but, rather, for *supplanting* or *preventing* such administration by effecting a settlement, or extension of the time of payment of a debtor's unsecured debts between a debtor and his creditors.
>
> "Naturally, therefore, the first object of the arrangement proceedings, different from that of bankruptcy, is *not to place a representative of the creditors,* in the person of a trustee, in charge of the estate; but the creditors, at their first meeting, are merely privileged to nominate one who, thereafter, in the event the arrangement

> proceedings collapse, shall be appointed by the court as trustee to liquidate the remaining assets and distribute their proceeds, in conformity with the provisions of the Act." (Emphasis ours.)

It is further to be borne in mind that there are two quite different classes of debtors who are authorized to petition for an arrangement under the provisions of 11 USCA, §§ 701 et seq. The first class is that of the *bankrupt* debtor who offers a plan or seeks an arrangement in connection with his bankruptcy, either before or after he has been adjudicated a bankrupt (§ 721). In this class of cases a trustee in bankruptcy may already be in charge when the plan for arrangement is submitted by the debtor.

The other class seeking an arrangement consists of a debtor who is not bankrupt, but is temporarily embarrassed in that he is unable to meet his current obligations in due course (§ 722). Here, only a receiver can be appointed and then only *if necessary* (§ 732 supra). In such cases, the law makes explicit provision that the corporation, when authorized by the court, may continue to operate the business (§ 713). The nature of the petitioner's possession under these circumstances is defined by § 742 as follows:

> "Where no receiver or trustee is appointed, the debtor shall continue in possession of his property and shall have all the title and exercise all the powers of a trustee appointed under this title, subject, however, at all times to the control of the court * * *"

It will be noted that nothing in this statute constitutes an *appointment* of the debtor as a trustee or as a receiver. It merely defines the powers that the debtor may exercise. This section was construed by this Ninth Court of Appeals in *Urban Properties Corp. v. Benson,* 116 F. (2d) 321. In that case, the lessee had applied for an Arrangement under Title 11 and its landlord sought to cancel its lease by virtue of the following provision:

> "If at any time during the term of this lease in any judicial action or proceeding a receiver or other *officer* or *agent* be appointed to take charge of the demised premises or the business conducted therein * * * the lessor shall have the right at their option immediately to terminate this lease." (Emphasis ours.)

It will be noted that the language here was much broader than § 5831-4 in that it referred not only to a receiver but to any other *officer* or *agent.* This court held that the lessor had the right to terminate its lease upon the filing of the petition for an Arrangement, not on the provision respecting the appointment of receiver, which it declined to do, but upon the legal definition of the words "officer or agent." This court quoted 11 USCA, § 1 (18) which states that the word "officer"

> " 'shall include * * * custodian * * * and trustee and the imposing of a duty upon * * * any officer shall include his successor and *any person authorized by law to perform the duties of such officer*' " (Emphasis supplied by the court.)

The court then continues:

> "The statutory continuance of a debtor in possession subject to the control of the court certainly creates the debtor 'a custodian' of the property under the court's control and hence an 'officer.' * * * Undoubtedly he (the debtor) is a 'court officer analogous to a receiver or trustee.' In re Wil-Low Cafeteria, 2 Cir. 111 F. 2d 83, 84.
>
> "However, whether or not the debtor is an officer within the provisions of Section 1 (22) [now subd. 18]), the authorization to conduct the business under the control of the court is to conduct it not as a free lessee, but as 'agent' for the court in its care of the interest of the creditors. In re Avorn Dress Co. D.C.N.Y., 11 F. Supp. 574. Lessee's function as agent may be regarded as 'analogous' to a receiver in equity." (Citing cases.)

In finally reaching the conclusion that the debtor who files a plan for an Arrangement is an "agent," it is obvious that the court went as far as it felt it consistently could in defining the nature of the possession of the debtor. This is emphasized by the vigorous dissent of Judge Healy in this case.

To hold that the debtor is an agent, or that he is a court officer analogous to a receiver, is to fall far short of holding that the petition is an application for the appointment of a receiver or trustee, which the Washington statute (§ 5831-4) requires. Although not binding on this court, the comment on the conclusion of the court in the Urban Properties case, supra, made by District Judge Hall in the case

of *In re Burke,* 76 F. Supp. 5, 10 is interesting and strongly confirmatory of the view we have taken.

Can we, then, say that whenever an embarrassed debtor petitions the court for an Arrangement, it is applying for the appointment of a receiver merely by filing such a petition? True, under some circumstances, the court may, *if necessary,* appoint a receiver (§ 732). But appellee is careful not to allege that Chemurgy, or anyone else, ever asked for the appointment of a receiver for it during the pendency of the appellee's plan for an Arrangement. Appellee is equally careful not to allege that any receiver ever was appointed during the more than six months in which Chemurgy was seeking to carry out its plan. If Chemurgy had succeeded with its plan, it is clear that the court would at once have released Chemurgy from its obligations to the court and Chemurgy would have gone its way in the business world, conducting its business much as it had done before it petitioned for an opportunity to make an arrangement with its creditors.

On the contrary, then, when a corporation, in filing its petition for an Arrangement, is not bankrupt and no one asks for the appointment of a receiver, nor is one appointed, it is clear that its mere filing of a petition is not an application for the appointment of a receiver. It is rather the submission of a plan to its creditors through the Bankruptcy Court for the purpose of *avoiding* the appointment of a

receiver, for the purpose of avoiding a later bankruptcy. By so doing the debtor declares its belief that it can get on without the liquidating processes of receivership or bankruptcy and it is making the effort so to do.

Six months later Chemurgy found itself unable to consummate its proposed plan of arrangement. Appellee's complaint (paragraph 4) (Tr. 2-3) alleges that "upon a hearing duly noticed and held" the court then declared Chemurgy to be a bankrupt and for the first time in these proceedings ordered "that bankruptcy be proceeded with" pursuant to the terms of the Bankruptcy Act.

It was, then, the act of Chemurgy in proceeding under § 776 (2) on December 13, 1947 that became its application for the appointment of a receiver or trustee within the meaning of § 5831-4, Remington's Revised Statutes. If December 13, 1947 is the date when Chemurgy first applied for the appointment of a receiver or trustee in bankruptcy, we then find that the payment alleged to be made by Chemurgy to the appellant was made much more than four months prior to the application for appointment of receiver. This is fatal to appellee's right to recover.

Second: Appointment of trustee in bankruptcy not made "pursuant to" Chemurgy's petition for an Arrangement. But, even if the court were to consider treating Chemurgy's petition for an Ar-

rangement as an application for the appointment of a receiver, because a receiver *might* have been appointed thereunder, still this could not satisfy the Washington statute.

It is to be noted that the Washington statute, § 5831-4 (see Appendix), is careful to define the term, "date of application," as meaning

> "the date of filing with the clerk of the court of the petition or other application for the appointment of a receiver, *pursuant to which application* such appointment is made."

The complaint of appellee (Tr. 2-4) in explicit terms negatives the hypothesis that this appointment of trustee in bankruptcy was made *pursuant* to the filing of a Petition for an Arrangement. To the contrary, the complaint (see paragraph 4) (Tr. 3) in effect alleges that the appointment was made when and only when Chemurgy was unable to consummate the proposed Arrangement. Then

> "upon a *hearing* duly noticed and held pursuant to section 376 (2) of the Act of Congress relating to Bankruptcy, said court on December 13, 1947 duly made and entered its order that Chemurgy is a bankrupt under said Act and that bankruptcy be proceeded with pursuant to the provisions of said Act."

These allegations make it manifest that it was pursuant to the hearing held after Chemurgy was unable to consummate the settlement which led to the order declaring that Chemurgy was a bankrupt

and that the later appointment of the trustee was likewise made "pursuant to" this hearing and order of December 13, 1947, not of the Petition for an Arrangement of May 29, 1947.

In other words, the Washington statute under which appellee sues (see Appendix) is careful to raise two separate tests by which the petition of the insolvent corporation must be tried. These two tests are

(a) the petition must be an application for the appointment of a receiver and,

(b) it must also be an application pursuant to which the appointment of a receiver is made.

We have seen that the application of Chemurgy for an Arrangement in no way complies with either of these two tests. Therefore, this failure to comply is fatal to appellee's assertion of a right to recovery.

Third: APPELLEE'S SUIT NOT BROUGHT IN TIME. There is another reason (raised by our 4th assignment of error) seen by us as equally conclusive why appellee cannot recover. The same Washington statute (§ 5831-5, R. R. S.—See Appendix) which permits recovery of preferential payments only when made within four months of the date of application for receiver, also makes it a condition precedent that the suit to recover the preferences

> "may be commenced at any time *within but not after* six (6) months from the date of application for appointment of such receiver." (Emphasis ours.)

A mere reading of this statute demonstrates that it is not a statute of limitation but a conditional grant of right to sue. The right does not come into existence unless the suit is brought within six months from the date of application for the appointment of a receiver. Thus, when appellee brought his suit on May 28, 1948 one day short of a full year after the date of an application for an Arrangement which was on May 29, 1947, he had no right on which to sue.

(a) *State Supreme Court holds* § 5831-5 *not to be a statute of limitation.* This statute has been construed exactly as we contend by the State of Washington. *In Morris v. Orcas Lime Co.,* 185 Wash. 126, 53 Pac. (2) 604, the Supreme Court of Washington was considering the effect of a slightly altered variation of the present statute (see § 5831-1, R. R. S., Laws '31, p. 160 §1). The court there said:

> "The limitation is not one that goes to the remedy of a defendant like the ordinary statute of limitation, but it goes to the cause of action or right to sue. The time prescribed—six months from the time of filing the application for appointment of trustee for the commencement of the action—is a *condition* to the enforcement of the liability or the trustee's right to recovery, *an element in the right itself.* The right falls with the failure to commence the action within the allotted time." (Emphasis ours.)

The slight verbal change made by the statute of '41 in no wise affects the application of this decision although the change does strengthen the position of the court.

In the court below appellee laid emphasis on the hardship of only six months within which to sue, pointing out that he was not appointed until more than six months after the application for an Arrangement made by the bankrupt. But that precise hardship contention was later made to the Supreme Court of Washington in the case of *Peeples v. Hayes,* 4 Wash. (2) 253, 256, 104 Pac. (2) 305 and answered effectively by Judge Robinson who strictly adhered to the doctrine of the Morris case *supra,* saying,

> "The ordinary statute of limitation is enacted for the benefit of those against whom claims are made; that is, for the benefit of defendants. It in no way affects the plaintiff's right, and gives the defendant a privilege only, which privilege may be exercised or waived at defendant's option. On the other hand, the limitation provided by § 5831-1 is a *condition* of the plaintiff's asserted right and the absence of allegations showing that the action has been commenced within the period limited renders his complaint demurrable for want of facts."

(b) *Federal decisions strictly to same point.* Our position is fully sustained by *In re Appalachian Publishers,* 29 Fed. Supp. 1021. There, a trustee in bankruptcy sued to recover usurious interest under a federal statute which doubled the amount *if sued upon* within two years of the time of the usurious

transaction. The bankruptcy trustee sued later than two years after the transaction but within two years of the filing of the petition in bankruptcy. Thus, if the bankruptcy statute of limitation controlled, he was in time; if the condition precedent of the usurious statute controlled, he was too late. The trustee contended, as does this plaintiff, that the bankruptcy limitation was paramount. The court said:

> "But for the statute relied upon here, there would be no cause of action, and in that statute the condition to the right or liability is as clear as the creation of the right itself. Reliance upon the statute by the trustee requires the acceptance of the conditions to existence of the right as well as the parts of the statute defining the right and conditioning its existence on the proviso respecting the time within which it exists." * * *
>
> "I conclude the statute of limitations carried into the Bankruptcy Act must be held to be strictly a statute limiting the time within which rights may be enforced, and *not a statute* undertaking to *strike down* in *another* statute a condition imposed therein as essential to the existence of the right itself." (Emphasis ours.)

The same question was raised in *Charlesworth v. Hipsh,* 84 Fed. (2) 834, 837 (8th Cir.), Cert. denied 299 U. S. 594. The court there said:

> "Counsel discuss this situation as if the 90-day period were a provision found in an ordinary statute of limitation, and contend that it was tolled by the order of the bankrupt court directing the trustee to take charge of the Davis Company's assets on February 24, 1932. In this view they are in error. Here the right and the

> remedy are both created by the bulk sales law. The limitation of the remedy is a limitation of the right as well as of the liability. Time is made by the law of the essence of the right. When, therefore, the 90-day period expired the rights of creditors against the vendee likewise expired."

Can the appellee take advantage of the Washington statute and at the same time strip it of the very condition that gives him the right to sue? To state the question is to answer it in the negative.

(c) *Text and decisions applying rule to other statutes of like character.* It is plain from the language of § 29e, on which appellee must rely, that it goes no farther at the most than to extend a "period of limitation" fixed by federal or state law. Statutes of limitation such as this seeks to extend are merely statutes of repose and are procedural in nature. The difference between the ordinary statute of limitation and qualifications attached to a given statutory right, such as exists in the Washington statute (§ 5831-5), is well expressed in the following text:

> "A wide distinction exists between pure statutes of limitation and special statutory limitations qualifying a given right in which time is made an essence of the right created and the limitation is an inherent part of the statute or agreement out of which the right in question arises, so that there is no right of action whatever independent of the limitation; a lapse of the statutory period operates, therefore, to extinguish the right altogether. To such limitations

> the rules of law governing pure statutes of limitation, applicable to all classes of actions, have no application; they are to be determined by the law of the place under which the right of action arose or the contract was made and are not to be treated as waived merely because they are not specially pleaded. They are not subject to the disabilities and excuses through which the effect of ordinary statutes of limitation may be avoided, nor, it seems, may they be evaded even by proof of fraud.
>
> "Whether a particular limitation of time is to be regarded as a part of the general statute of limitations or as a qualification of a particular right must be determined from the language employed and from the connection in which it is used." (53 C.J.S. 904 § 1(2) (c))

It is manifest that § 29e has no language appropriate or adequate to describe such "a condition," such "an element in the right itself," as the Washington Supreme Court has aptly described it. Ought, then, this Court to extend the language of § 29e by latitudinarian construction to cover this so different situation?

It is plain that such an extension would distort the state statute. It would make it mean something quite different from what its authors intended. It would destroy a basic element in this limited right, and create a right of different characteristics from the right set up in the statute.

On the other hand, there is no need to distort the Washington statute or to add a new and different provision to § 29e of the Bankruptcy Act. The Bank-

ruptcy Act itself creates its own definition of what constitutes a recoverable preference. If this appellant has received a preference, appellee has an adequate remedy under the Bankruptcy statute itself without resorting to the state statute and then demanding that the state statute be refashioned to fit the position in which appellee finds himself.

But if appellee disdains the Bankruptcy definition of preferential payments and finds it more convenient to use the state definition of preferential payments, he must take the state's definition *cum onere.* He cannot use that part of the state's definition which pleases him and reject the rest.

There was a time when federal courts pressed the dominance of federal statutes over state statutes and state policy to a degree no longer deemed appropriate. When Mr. Justice Brandeis wrote the decision of the U. S. Supreme Court in *Erie R. Co. v. Tompkins,* 304 U. S. 64, in which *Swift v. Tyson* was overruled after 95 years of almost constant application in the federal courts, that decision did more than adopt a rule of respect for state statutes and state judicial decisions.

In *Guaranty Trust Co. v. York,* 326 U. S. 99, 101 Mr. Justice Frankfurter gave voice to the change of trend of our federal courts when he said:

> "In overruling Swift v. Tyson, 16 Pet. 1, Erie R. Co. v. Tompkins did not merely overrule a venerable case. It overruled a *particular way of*

> *looking at law* which dominated the judicial process long after its inadequacies had been laid bare."

The Tompkins and York cases, not otherwise in point here, are, as this court is aware, but a symbol of the many cases that in late years indicate the high respect the federal courts pay to state enactments, the great reluctance to alter their effect.

Such reluctance is especially applicable where

> "plainly enough, a statute that would completely bar recovery in a suit if brought in a State court bears on a state-created right vitally and not merely formally or negligibly." (Guaranty Tr. Co. v. York, supra)

This statement precisely defines the difference between an extension of the mere statute of general limitation by a federal statute and one that alters vitally a state-created right.

This distinction between the ordinary statute of limitations, such as is the subject of § 29e, and a condition of the right that is contained in the heart of the act creating that right, has been made and applied in many cases, both state and federal, and under a variety of circumstances, as is indicated by the citations in 53 C. J. S., p. 904, attached to the quoted text, *supra.* We select but a few of these cases for illustration of the subject.

Thus, in *Ford, Bacon & Davis, Inc. v. Volentine,* 64 Fed. (2) 800, 802, in dealing with liability for injury, 5th C. C. A. says:

> "While ordinarily the limitations of the forum are applied as pertaining merely to the remedy, there is an exception where the cause of action is created by a foreign statute which also fixes a limitation for its assertion. The limitation is then considered to be a condition of the right, so that no recovery is allowed where recovery would be barred by the law which gives the right."

In *Western Fuel Co. v. Garcia,* 257 U. S. 233, 243, where the same issue arose in an admiralty case, the court quoted the following apt language of Mr. Chief Justice Waite (used by him in *The Harrisburg,* 119 U. S. 213, 214):

> "The statutes create a new legal liability, with the right to a suit for its enforcement, provided the suit is brought within twelve months, and not otherwise. The time within which the suit must be brought operates as a limitation of the liability itself as created, and not of the remedy alone. It is a condition attached to the right to sue at all. No one will pretend that the suit in Pennsylvania, or the indictment in Massachusetts, could be maintained if brought or found after the expiration of the year, and it would seem to be clear that, if the admiralty adopts the statute as a rule of right to be administered within its own jurisdiction, it must take the right subject to the limitations which have been made a part of its existence. It matters not that no rights of innocent parties have attached during the delay. Time has been made of the *essence of the right,* and the right is lost if the time is disregarded. The liability and the remedy are created by the same statutes, and the limitations of the remedy are, therefore, to be treated as limitations of the right."

In *Vaughn v. U. S.,* 43 F. Supp. 306, 308 the distinction we urge is stated as follows:

> "This provision of Section 19 is not, strictly speaking, a statute of limitation. The pure statute of limitation merely limits or restricts the time within which a right, otherwise unlimited, may be exercised. The provision is more or less in the nature of those special statutory limitations, which are in reality statutes of creation, in which time is of the essence of the right claimed and the limitation is an inherent part of the statute from which the right in question arises. To such limitations the rules which govern pure statutes of limitation do not apply."

And, in *Wilson v. Ry. Co.,* 58 F. Supp. 844, 847, a large number of the cases are quoted from and cited sustaining this distinction in unqualified terms. The following excerpt is pertinent:

> "In Bell v. Wabash Ry. Co., 8 Cir., 58 F. 2d 569, 571, the Circuit Court of Appeals of this circuit, which at the time had under consideration Sec. 6 of the Federal Employers' Liability Act, said:
>
> 'The limitation of said section as to time in which the action may be maintained clearly conditions liability, and enters into the right created as a substantial part thereof. It is not a mere statute of limitations pertaining to the remedy. If the action is not brought within the time provided, the right to proceed under the act is ended. In Judge Sanborn's opinion in Eberhart et al. v. United States, for Use of First Nat. Bank of Belle Fourche, S. D. 8 Cir., 204 F. 884, 890, 891, he says: "An act of Congress, which at the same time and in itself authorizes or creates a new liability and prescribes the limita-

> tions thereof and of its enforcement, makes those limitations conditions of the liability itself. Such an act is not a statute of limitations, and a compliance with the conditions which it prescribes is indispensable to the enforcement of the liability it authorizes or creates * * * because such limitations are conditions of the liability itself and not limitations of the remedy only." * * *
>
> 'In American R. Co. of Porto Rico v. Coronas, 230 F. 545, 546, L.R.A. 1916E, 1905, the Circuit Court of Appeals of the First Circuit, referring to the provision of the Federal Employers' Liability Act, says: "The right granted exists only by virtue of the statute, and its scope and effect must be determined therefrom. * * * The bringing of the action, therefore, within the specified time, is a condition to the exercise of the right, and, if the condition is not complied with, the parties stand, with respect to the wrongful act, as though the statute had not been enacted. The limitation relates, not merely to the remedy, but to the right." * * *' "

That this principle still expresses the legal concept of our U. S. Supreme Court is illustrated by the quite recent restatement of it by Mr. Justice Black in *Garrett v. Moore-McCormick Co.,* 317 U. S. 239, 245, as follows:

> "The constant objective of legislation and jurisprudence is to assure litigants full protection for all *substantive* rights intended to be afforded them by the jurisdiction in which *the right itself originates.* Not so long ago we sought to achieve this result with respect to enforcement in the federal courts of rights created or covered by state law [citing Erie R. Co. v. Tompkins, 304 U. S. 64].

> "And admiralty courts, when invoked to protect rights *rooted in state law* endeavor to determine the issues in accordance with the *substantive law* of the State [citing Western Fuel Co. v. Garcia, 257 U. S. 233, 242]."

(d) *Trial Judge's Opinion—Sproul v. Gambone.* The learned trial judge's discussion of the distinction we here press upon the Court took rather a narrow range. At some length the trial judge, in his opinion (Tr. 7), vindicates the right of Congress under its powers to enact bankruptcy legislation, to affect substantive rights. That we do not deny. We say only, *if* Congress does intend to affect substantive rights, as distinguished from those of a mere procedural nature, that intent must appear in the legislation by express language.

To the the contrary, a reading of § 29e plus a consideration of the records of the 74th Congress, Second Session, H. R. 8046 footnote (quoted in *Sproul v. Gambone,* 34 F. Supp. 441, 444), indicates clearly that Congress neither went nor intended to go farther than to deal with the ordinary statutes of limitation, essentially procedural in nature.

Having thus vindicated the power of Congress and assuming without demonstrating that Congress intended by § 29e to vitally affect rights "rooted in state law," as Mr. Justice Black has put it, the able trial judge then selects alone the case of *In re Appalachian Publishers,* 29 F. Supp. 1021 to disagree with its conclusion, saying that

> "I prefer the reasoning, *implicit* in Sproul v. Gambone [supra] that such a limitation does not prevent the genesis of the right, but *only makes provision* for its expiration when the *limitation has run.*" (Emphasis ours.)

In so saying the trial judge completely disregards the "wide distinction" between the ordinary statute of limitation and the statute-created right which contains within it the terms and conditions under which that right may be exceeded.

Such a statement ignores the declaration that such a condition to the existence of the right iself, as Mr. Chief Justice Waite said in *The Harrisburg,* supra, "is of the essence of the right." It ignores the declaration of the Supreme Court of Washington construing the statute that this condition is "an element in the right itself." It pays no heed to the opinion of the 8th Circuit in *Bell v. Railway Co.* (quoted above from the opinion in *Wilson v. Railway Co.,* supra) that

> "such an act is *not a statute of limitations* and a compliance with the condition which it prescribes is *indispensable* to the enforcement of the liability it authorizes or creates."

Passing from the trial judge's opinion to the consideration of the case on which he relies, *Sproul v. Gambone,* supra, that opinion overlooks the decision of *In re Appalachian Publishers,* 29 F. Supp. 1021 and addresses itself exclusively to *Charlesworth v. Hipsh, Inc.,* 84 Fed. (2) 834, 835 as its sole antagonist. Judge Schoonover, in that case, criticizes the

cases cited by the Charlesworth decision as not supporting its text. True, they can be distinguished in their factual setting. But the principle of law each of these cited cases states is exactly the principle for which we here contend.

Sproul v. Gambone, supra, also finds fault with the holding in the Charlesworth case on the ground that its discussion of the law is dictum. Then, quite inconsistently, Judge Schoonover converts his own legal decision into dictum by saying, in conclusion:

> "[8] Then, too, we are of the opinion that even though § 11 sub. e [§ 29e, 11 USCA] should be held not to apply to the instant case, yet the motion must be denied in view of the fact that plaintiff started proceedings in the bankruptcy court for an injunction and summary relief for the reclamation of this property within the 90-day period fixed by the Pennsylvania Act!"

Thus, Judge Schoonover realized, if the trial court did not, that he was at least treading on doubtful ground in holding that the 90-day condition in the Pennsylvania statute was "a state statute of limitation."

V.

Conclusion

There are, then, three reasons, each fatal to the sufficiency of appellee's complaint for holding that the complaint of appellee does not state a cause of action.

First: Since, by its petition for an Arrangement filed May 29, 1947, 11 USCA, §§ 701 et seq., Chemurgy did not seek the appointment of a receiver, but rather sought to avoid such an appointment, the date of filing such a petition cannot be regarded as the date of "application for the appointment of a receiver," as required by § 5831-4, R. R. S. It then follows that any payments made within four months of May 29, 1947 cannot be regarded as preferential.

Second: Since no appointment of a receiver or trustee was in fact ever asked for, or made, under the petition of Chemurgy for an Arrangement but only when Chemurgy confessed to the Bankruptcy Court that it no longer hoped for an Arrangement, but must submit to be adjudged a bankrupt, then it must be held that the receiver or trustee was not appointed "pursuant to" the petition for an Arrangement, as required by § 5831-5, R. R. S., but that such appointment was made pursuant to this admission of Chemurgy of failure of its plan for an Arrangement. Since payments made to appellant within four months of May 29, 1947 cannot possibly be within four months of the date of December 13, 1947, when Chemurgy changed over from an applicant for an Arrangement to an applicant for bankruptcy, therefore, for this reason as well, appellee's complaint does not state a cause of action.

Third: Since the statute-created right to recover a preference under the law of the state of Washington has imbedded in it the condition that suit to

recover a preference must be commenced within, but not after, six months from the date of application for the appointment of a receiver, even though we accept the date of May 29, 1947 as such a date, nevertheless, appellee's complaint does not state a cause of action since this suit was commenced on May 28, 1948 but one day short of a year later.

For each of these reasons we respectfully submit that the judgment of the trial court should be reversed.

Respectfully submitted,

JOSEPH L. HUGHES,
BENJAMIN H. KIZER,
Attorneys for Appellant,
Elmer Schneidmiller.

APPENDIX

Remington's Revised Statutes

§ 5831-4. Words and terms used in this act shall be defined as follows:

(a) "Receiver" means any receiver, trustee, common law assignee, or other liquidating officer of an insolvent corporation.

(b) "Date of application" means the date of filing with the Clerk of the Court of the petition or other application for the appointment of a receiver, pursuant to which application such appointment is made; or in case the appointment of a receiver is lawfully made without court proceedings, then it

means the date on which the receiver is designated, elected or otherwise authorized to act as such.

(c) "Preference" means a judgment procured or suffered against itself by an insolvent corporation or a transfer of any of the property of such corporation, the effect of the enforcement of which judgment or transfer at the time it was procured, suffered, or made, would be to enable any of the creditors of such corporation to obtain a greater percentage of his debt than any other creditor of the same class.

§ 5831-5. If not otherwise limited by law, actions in the courts of this state by a receiver to recover preferences may be commenced at any time within but not after six (6) months, from the date of application for the appointment of such receiver.

§ 5831-6. Any preference made or suffered within four (4) months before the date of application for the appointment of a receiver may be avoided and the property or its value recovered by such receiver. No preferences made or suffered prior to such four (4) months' period may be recovered, and all provisions of law or of the trust fund doctrine permitting recovery of any preference made beyond such four (4) months' period are hereby specifically superseded.